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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1016

FEDERAL POWER COMMISSION

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FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Collateral Proceeding)

Respondents.

FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Curtailment Proceeding)

Respondents.

MEMORANDUM OF RESPONDENT INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

On February 7, 1972, the Solicitor General, acting on behalf of the Federal Power Commission, petitioned for writs of certiorari to the United States Court of Appeals for the Fifth Circuit. The petitions seek to bring before this Court (1) the decision of the court of appeals in *Louisiana Power & Light Co., v. United Gas Pipe Line Co.* (the collateral

proceeding)[1] and (2) the Power Commission's Opinion and Order Nos. 606 and 606-A (the curtailment proceeding).[2] The latter are before the court of appeals on several petitions for review filed pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

Respondent International Paper Company (IP) is a direct sale customer of United Gas Pipe Line Company (United) and was a party to the curtailment proceeding, which involved the establishment of priorities governing deliveries of United's gas supplies, before the Commission. On December 15, 1971, IP filed with the Fifth Circuit a petition for review of the orders issued by the Commission in that proceeding. This petition, assigned Docket No. 71-3531, was, upon motion of the Commission, subsequently consolidated with five other petitions on February 16, 1972.

As delimited by IP's application for rehearing to the Commission,[3] the issues raised by its petition for review in the court of appeals do not include any question as to the Commission's jurisdiction over curtailment of gas deliveries to direct industrial customers of an interstate pipeline.[4] Instead IP has only questioned the Commission's authority to approve a proposed tariff provision relating not to deliveries of gas to direct customers but rather to the rates to be charged such customers. Such a provision was contained in § 12.3 of United's tariff filing of May 17, 1971, and would

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[1]Set out at pages 1a-27a of the Solicitor General's petitions.

[2]Set out at pages 48a-84a of the Solicitor General's petitions.

[3]Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), imposes an unusual, stringent prohibition against raising in court issues not raised in petitions to the agency for rehearing. Other parties did preserve the jurisdictional issue on petitions for rehearing and raised it in their petitions for review.

[4]This question is the principal one which the Solicitor General seeks to have determined by this Court (Petitions at 4-5). IP, of course, has no interest in the second question presented, i.e., whether the courts or the Commission should determine initially the jurisdictional status of a pipeline's facilities.

have eliminated, in times of impaired deliveries, United's obligation to IP under a so-called "substitute fuel" clause contained in IP's contracts with United. This clause provides for reimbursement of IP, under certain circumstances, for the incremental costs of substitute fuel utilized during times when United is unable to meet its delivery obligations.

In addition, IP has taken issue with (1) the Commission's ruling that operation by United of its system in accordance with a Commission-approved curtailment plan constitutes an absolute defense to any breach of contract action by direct, nonjurisdictional customers, even if based on the substitute fuel clause described above, and (2) the Commission's ruling, without a hearing on the question, that such a clause is *per se* unlawfully preferential and therefore invalid.[5]

In view of the foregoing, it is clear that the issues on which the Solicitor General's petitions seek certiorari and certiorari before judgment are not presented by IP's petition for review now pending before the Fifth Circuit. Accordingly, there is no reason for the Court to grant the petition for certiorari before judgment insofar as it encompasses IP's petition for review.

The Solicitor General appears to have recognized that the issues raised by IP in the Fifth Circuit are not encompassed by the first question presented in his petitions. At p. 21, the Solicitor General says:

> "To the extent that the petitions for review raise issues in addition to the question of the Commission's basic authority over curtailment of natural gas deliveries to direct sales customers, the cases can be remanded to the court of appeals for further proceedings after disposition of the basic issue by this Court."

[5]The portions of the Commission's opinions to which the issues raised by IP in the proceedings before the Fifth Circuit are addressed are set out at pages 68a-71a and 80a-81a of the Solicitor General's petitions.

Since IP's petition for review *in toto* raises issues other than the question of the Commission's basic jurisdiction, we respectfully suggest that the Court need not and should not grant certiorari with respect to the IP proceeding, but should rather permit IP's petition for review to remain pending before the Fifth Circuit for whatever proceedings that court believes appropriate in light of the action of this Court. The Solicitor General's petitions are filed under 28 U.S.C. § 1254(1), which provides for review by this Court of "cases in the courts of appeals" and specifically for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The "cases" in the court of appeals are the several petitions for review. There is no point bringing here IP's "case," which does not even pose the issue the Solicitor General wants this Court to decide.

Yet another reason for denial of certiorari before judgment with respect to IP's petition for review is that, while the threshold question of the Commission's jurisdiction has been determined adversely to the Commission by the Fifth Circuit in the collateral proceeding, this is not the case with respect to the issues raised by IP. Those issues were not before the Fifth Circuit in the collateral proceeding. They were raised only in the context of the curtailment proceeding. Consequently, the current decisional status of these issues cannot give rise to any claim of uncertainty as to the Commission's basic authority to administer curtailments of natural gas, the claim associated with the Fifth Circuit's decision in the collateral proceeding. Thus no pressing need exists, in terms of the orderly administration of the Natural Gas Act or the utilization of natural gas resources, for this Court now to face the issues raised by IP in the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the Solicitor General's petition for certiorari before judgment should be denied with respect to IP's petition for review now pending before the Fifth Circuit in Docket No. 77-3553.

Respectfully submitted.

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